IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

Appeal No.379 of 2007
In
Company Petition No.145 of 2006

ICICI Lombard General Insurance Company Limited. .. Appellant (Org.Petitioner)

Versus

Parasmani Roadliners Pvt.Ltd. .. Respondent (Org.Respondent)

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S/Shri Janak Dwarkadas, Sr.Counsel with Vikram Trivedi, Birendra Saraf, Ms Nita Gaglani, S/Shri Sachin Chandarana and Mayur Bhojwani for the appellants i/b M/s.Manilal Kher Ambalal & Co. for the appellant.

Ms Geeta M. Bhoir i/b Saxena & Co. for the respondent.

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CORAM : R.M.S.KHANDEPARKAR &
D.G.KARNIK, JJ

DATED : 12TH JUNE, 2007

**P.C.**

1. This appeal is directed against the judgment and order dated 14th March, 2007 passed by a learned Single Judge of this Court dismissing at the stage of admission the winding up petition filed by the appellant.

2. J.K. Industries Ltd. gave to the respondent, who is a common carrier, 9 Metric Tons (9000 kgs) of Carbon Black for transportation. In a road accident, part of the goods was damaged. Open delivery was asked and the respondent issued a damage certificate. As per the damage certificate, the packages (bags) in which the goods were carried were damaged and there was shortage to the extent of 185 kgs. The consignee, who had insured the goods with the appellant, made a claim on the insurance company for the sum of Rs.3,69,363/- for the loss or damage to the goods. The appellant, after taking into consideration the survey report of the surveyor appointed by it, assessed the loss at Rs.1,71,439/- and paid the said sum to the consignee on 31st July, 2003 by a cheque.

3. After obtaining a letter of subrogation, the appellant issued a notice demanding Rs.1,71,439/- from the respondent and on failure of the respondent to pay the said sum within the statutory period of 21 days filed a petition for winding up of the respondent company. By his judgment and order dated 14th March, 2007 the learned Company Judge dismissed the winding up petition on the ground that there was no ascertained debt due and payable by the respondent to the petitioner. He held that unless the negligence of

the carrier was established in accordance with the provisions of Sections 8 and 9 of the Carriers Act, 1855, it cannot be said that the respondent was liable to pay any money to the consignee or the appellant. He held that unless the negligence was established in a suit it cannot be said that any debt was due and payable by the respondent. He therefore dismissed the company petition at the stage of admission itself. That decision is impugned in this appeal.

4. Strongly relying upon the decision of the Division Bench of Karnataka High Court in **Kudremukh Iron Ore Co.Ltd. v. Rooky Roadways Ltd.,** reported in 1990 (69) Company Cases 178, on which the reliance was also placed before the learned Single Judge, Shri Dwarkadas, learned counsel for the appellant submitted that Section 9 of the Carriers Act enables a consignee of the goods to bring a suit against a common carrier for damages for loss of or damage to goods entrusted to it for carriage without proof of negligence. He submitted that the learned Company Judge clearly erred in holding that the appellant was required to prove negligence is a suit for damages and as the negligence was not proved by filing a suit, the debt was not established. he further admitted that on the basis of the surveyor’s report the exact of loss and damage was

not ascertained and therefore the quantum of liability was ascertained and it could not be said that the debt or liability was of an unascertained sum of money.

5. Invoice (Exhibit-A) shows that Carbon Black of a Metric Tons (9000 Kgs.) was given to the respondent for transportation. During transit the consignment was damaged. The shortage/damage certificate dated 11th June, 2003 issued by the respondent shows that 10 bags were booked and all 10 bags were delivered but the packaging was damaged and 185 Kgs of Carbon Black was short-delivered. The shortage/damage certificate does not give estimation of the value of the damage. The claims of the petitioner based on shortage/damage certificate are two, firstly for short delivery of 185 kgs. goods which would be valued at about Rs.7,000/- taking into consideration the rates mentioned in the invoice and secondly for the damage, if any, to the remaining quantity of the goods. The extent of damage to the remaining quantity of the goods cannot be ascertained from the shortage/damage certificate.

6. On the basis of the materials on record it cannot be ascertained what was exact extent of damage goods. The respondent has denied the claim for damages. The damage, as per the certificate, appears

to be only to the packaging. Undoubtedly, the respondent who is a common carrier would be liable to pay for damage to the goods. However, since the damage is disputed and the damage as well as the value of the damage of the goods is not ascertained and is not ascertainable from the materials on record placed before the learned Company Judge, it cannot be said that the learned Company Judge erred in coming to the conclusion that the claim of the appellant is not ascertained and not even ascertainable. The claim is denied by the respondent. In the circumstances, except for the claim to the extent of Rs.7,000/- which is for the short delivery of 185 Kgs. of the goods, the claim of the appellant is disputed and not ascertainable.

7. The learned counsel for the respondent fairly stated that the respondent is willing to deposit a sum of Rs.7,000/- being the price of the goods short delivered. Since the admitted claim is being deposited in the Court, winding up petition is not maintainable in respect of the claim which is seriously disputed and has not been adjudicated. Needless to say, it is open to the appellant to prove the claim of damages by filing of a civil suit before a regular court.

8. In the facts and circumstances of the case, since we have come to the conclusion that the claim for damages would be required to be proved by the appellant is a proceeding before a competent court, we decline to consider the question on whom the burden of proving negligence lies. Needless to say that such a issue can be raised by the appellant is a proceeding which it may institute for recovery of damages. All the contentions of the parties regarding the same are kept open.

9. For these reasons, except a small modification in respect of the payment of Rs.7,000/-, we see no reason to interfere in the order of the learned Company Judge. We accordingly pass the following order.

10. In pursuance of the statement made by the learned advocate for the respondent, the respondent shall deposit in this court Rs.7,000/- within a period of four weeks from today or pay the said amount directly to the appellant. If the amount is deposited in the Court, the appellant shall be entitled to withdraw the same without any security. Subject to this modification, the appeal stands dismissed.

( D.G.KARNIK, J) (R.M.S.KHANDEPARKAR, J)